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Nos. 89-171 and 89-5641

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1989

ANTHONY DICARLANTONIO, PETITIONER

v.

UNITED STATES OF AMERICA

JOHN PRAYSO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether proof that money paid to petitioners was furnished by the FBI constructively amended the charge of conspiracy to violate the Hobbs Act, 18 U.S.C. 1951.

2. Whether the admission of petitioner Prayso's post-arrest statements was harmless error with regard to petitioner DiCarlantonio.

3. Whether petitioners were entitled to be sentenced under the current sentencing guidelines even though their offenses occurred before the effective date of the guidelines.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A10) is reported at 870 F.2d 1058.[1]

JURISDICTION

The judgment of the court of appeals (Pet. App. A11) was entered on March 17, 1989. A petition

[1] "Pet. App." refers to the appendix to the petition in No. 89-171.

for rehearing was denied on June 1, 1989 (Pet. App. A12). The petition for a writ of certiorari in No. 89-171 was filed on July 31, 1989. The petition for a writ of certiorari in No. 89-5641 was not filed until September 21, 1989, and is out of time under Rule 20.1 of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Ohio, petitioners were convicted of conspiracy to obstruct interstate commerce by extortion (Count 1), and the substantive offense of extortion (Count 2), both in violation of the Hobbs Act, 18 U.S.C. 1951. Both petitioners were sentenced to concurrent terms of 15 years' imprisonment. The court of appeals affirmed petitioners' conspiracy convictions but reversed their convictions on the substantive count.

1. The pertinent facts are summarized in the opinion of the court of appeals. Pet. App. A1-A3. In May 1986, Otto Jack, an attorney in Steubenville, Ohio, consulted petitioner DiCarlantonio, who was then the Steubenville city attorney, about a local fire ordinance and the placement of propane gas tanks within city limits. Jack represented Jody Glaub of Atlas Gas Company, a propane gas distributor. DiCarlantonio advised Jack that he would discuss the matter with petitioner Prayso, the local fire chief who previously had caused the removal of propane tanks belonging to Atlas Gas. *Id.* at A1-A2.

On May 12, Jack telephoned DiCarlantonio to inquire whether any progress had been made. DiCarlantonio suggested that Jack give money to Prayso. Although Jack resisted the idea, arrangements were made for Jack to meet with petitioners at DiCarlantonio's office the next day. At the May 13

meeting, petitioner Prayso spoke of the large profit to be made and shared through kickbacks from suppliers of propane; Jack protested that such an arrangement would be illegal. Another meeting was scheduled for the next day. Pet. App. A2.

Between the May 13 meeting and the May 14 meeting, Jack and Glaub notified the FBI and agreed to assist an FBI investigation. At the May 14 meeting Jack and Glaub agreed that Glaub would calculate the profits he could expect as a result of a change in the ordinance, and that petitioners would receive shares of the anticipated profits. On May 20, petitioners agreed to a $30,000 fee for working to change the ordinance. Immediately after the meeting, petitioners began lobbying local officials in an effort to persuade them to change the ordinance. Pet. App. A2.

Glaub received $30,000 in cash from the FBI with which to make the payment, and on May 28 he delivered the money to petitioners. Prayso was arrested the same day, and $15,000 in cash was found in his socks. DiCarlantonio was also arrested, with a briefcase in his possession. When the FBI agents questioned him about the briefcase, DiCarlantonio claimed that he had no key to open it. Upon being told that the briefcase had a combination lock, DiCarlantonio stated that the combination was 1-3-3, but he warned that the lock would stick. When the FBI agents opened the briefcase in DiCarlantonio's presence, they found $15,000 in cash inside. DiCarlantonio then exclaimed, "Oh, how did that get there?". Pet. App. A2-A3.

2. Following their first trial, petitioners were convicted on extortion charges, but their convictions were reversed. *United States* v. *DiCarlantonio*, 830 F 2d 194 (6th Cir. 1987) (Table). Before the second trial,

DiCarlantonio sought a severance on the ground that the government intended to introduce Prayso's post-arrest statements and that the statements incriminated him. In response, the government agreed to redact the post-arrest statements. The court denied a severance, but it directed counsel to request a bench conference before testimony regarding Prayso's statements was introduced to ensure that the necessary redactions were made. Pet. App. A17-A18.

At trial, two FBI agents testified about Prayso's post-arrest statements. Gov't C.A. Br. 26-31. In the government's rebuttal case, an FBI agent testified that the $30,000 was furnished by the FBI and that the FBI was an interstate operation. *Id.* at 21.

3. The court of appeals reversed petitioners' substantive Hobbs Act convictions, but affirmed their conspiracy convictions. The court reversed the substantive convictions on the ground that the use of FBI funds was inadequate to establish an effect on interstate commerce, as required by the Hobbs Act, and that the government had failed to prove that the extortion had an effect on the flow of propane gas in interstate commerce. Pet. App. A3-A5. The court sustained the conspiracy convictions, however, because "a conspiracy charge requires the government to prove only that the defendants' scheme would have affected commerce." *Id.* at A6. The court further found that "a reasonable jury clearly could have found that [petitioners] had conspired to extort money from Glaub and Atlas Gas, and that, if successful, this scheme would have affected commerce by depleting the assets of an enterprise in interstate commerce." *Id.* at A7.

The court also rejected DiCarlantonio's contention that the admission of Prayso's statements required

reversal under the principles of *Bruton* v. *United States*, 391 U.S. 123 (1968). Although concluding that the redaction did not appear to satisfy the standards established by this Court in *Richardson* v. *Marsh*, 481 U.S. 200 (1987), the court held that reversal was not required because petitioner's counsel had failed to challenge the redaction and because "in light of the strength of the evidence of [DiCarlantonio's] guilt, any error was harmless." Pet. App. A7-A8.

ARGUMENT

1. Petitioners contend (89-171 Pet. 4-7; 89-5641 Pet. 4-7) that the government amended the conspiracy charge by adducing evidence that provided the jury with a new theory of how interstate commerce was affected. An indictment is constructively amended when the court permits a new basis for conviction other than that which appears in the indictment. *United States* v. *Miller*, 471 U.S. 130, 138 (1985); *Stirone* v. *United States*, 361 U.S. 212, 215-216 (1960). According to petitioners, the government constructively amended the indictment by eliciting testimony, in its rebuttal case, that the FBI was an interstate operation and that the payment of $30,000 in FBI funds to petitioners depleted or diminished the funds available to the FBI for a period of time.

As the court of appeals noted (Pet. App. A6), proof of an actual effect upon interstate commerce is an element of a substantive Hobbs Act violation, but not of a Hobbs Act conspiracy. See *United States* v. *Jannotti*, 673 F.2d 578, 590-594 (3d Cir.) (en banc), cert. denied, 457 U.S. 1106 (1982). The gravamen of the Hobbs Act conspiracy is an agreement that "would have affected commerce," not an actual effect

on commerce itself. Pet. App. A6. The testimony about the fact that the funds were actually FBI funds (and that the FBI was an interstate operation) did not relate to the agreement between petitioners charged in Count 1. *Id.* at A13-A16. There was no suggestion at trial that petitioners knew that the funds were FBI funds, or that their illegal agreement encompassed a plan to obtain FBI assets. Although the source of the funds was material to the substantive count,[2] it was the contemplated source of funds from petitioners' perspective that was pertinent to the conspiracy charge. Proof about the eventual source of the funds, which was different from that envisioned by the conspirators, thus did not amend the indictment with respect to the conspiracy charge.[3]

2. Petitioner DiCarlantonio claims (89-171 Pet. 7-13) that the introduction of petitioner Prayso's post-arrest statements, through the testimony of FBI agents, violated his rights under the Confrontation Clause of the Sixth Amendment, as set forth in *Bruton* v. *United States*, 391 U.S. 123 (1968), and *Cruz* v. *New York*, 481 U.S. 186 (1987). That violation, he contends, requires that his conviction be reversed. The court of appeals found merit in the Confrontation Clause argument, Pet. App. A7-A8, but it

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[2] With respect to the substantive count, the court of appeals concluded that petitioners' objection to the testimony regarding the interstate character of the FBI was moot. Pet. App. A5 n.2.

[3] None of the decisions relied on by petitioners (see 89-171 Pet. 4-7; 89-5461 Pet. 4-7) involved a claim that a conspiracy charge was constructively amended by proof relating only to a jurisdictional element of a substantive charge and concerning matters not known or contemplated by defendants at the time of their illegal agreement.

concluded that reversal was not required because DiCarlantonio did not challenge the introduction of the testimony at trial and because any violation was harmless. *Id.* at A8.

The court of appeals was correct in upholding DiCarlantonio's conviction. DiCarlantonio did not object to the pertinent portions of the FBI agents' testimony at trial. He did not object to the redacted statements before their introduction, as the district court's order contemplated, Pet. App. A8, and with respect to the most explicit reference to DiCarlantonio (see 89-171 Pet. 8), his counsel specifically stated that the proposed testimony was not improper. See Gov't C.A. Br. 27.[4]

In the absence of a contemporaneous objection, a party must establish "plain error." Fed. R. Crim. P. 52(b). "[T]he plain error exception to the contemporaneous-objection rule is to be 'used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result.'" *United States*

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[4] DiCarlantonio bases his Sixth Amendment claim on four statements by Prayso: (1) his statement to the FBI, "what are you doing here?" (89-171 Pet. 8); (2) his description of a meeting attended by Jack, Glaub, and DiCarlantonio (*ibid.*); (3) his description of the payoff in DiCarlantonio's office (*id.* at 8-9); and (4) his explanation for having $15,000 in his socks (*id.* at 9-10). As the government explained in its court of appeals brief (at 26-31), DiCarlantonio objected only to the first and fourth statements. Neither of those statements was hearsay; thus both would have been fully admissible against DiCarlantonio even if he had made a Confrontation Clause objection to their admission against him. The first statement was not an assertion at all, and the fourth was not introduced for its truth, but was introduced merely to show that it was made, so that it could later be shown to be false. See Fed. R. Evid. 801(a) and (c); *Anderson* v. *United States*, 417 U.S. 211, 220 (1974). In any event, neither the first nor the fourth statement incriminated petitioner.

v. *Young*, 470 U.S. 1, 15 (1985) (quoting *United States* v. *Frady*, 456 U.S. 152, 163 n.14 (1982)).[5] The admission of the FBI agents' testimony did not result in a miscarriage of justice. As the court of appeals determined, "in light of the strength of the evidence of [DiCarlantonio's] guilt, any error was harmless." Pet. App. A8. The evidence in the record fully supported this determination and, in any event, that fact-specific ruling does not warrant further review.[6]

3. Petitioners contend (89-171 Pet. 13-17; 89-5641 Pet. 7-10) that although their offenses were committed before November 1, 1987, the effective date of the current sentencing guidelines, they were entitled to be sentenced under the guidelines. Petitioners maintain that their second trial, including the sentencing, occurred after November 1, 1987; that nothing in the governing statute or guidelines prohibits application of the guidelines to sentences imposed after November 1, 1987, for conduct occurring before that date; and that there is no constitutional barrier to applying the guidelines retroactively, because to do so would not increase petitioners' punishment.

Petitioners' claim is contrary to the explicit terms of the governing statute. The sentencing guidelines became effective on November 1, 1987. Sentencing Reform Amendments Act of 1985, Pub. L. No. 99-217, § 4, 99 Stat. 1728 (amending the Sentencing Re-

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[5] DiCarlantonio apparently recognizes that his claim must be evaluated under a "plain error" standard. See 89-171 Pet. 13.

[6] It is well established that *Bruton* violations are subject to harmless error analysis. See *Schneble* v. *Florida*, 405 U.S. 427, 430 (1972); *Harrington* v. *California*, 395 U.S. 250, 254 (1969).

form Act of 1984, Pub. L. No. 98-473, § 235, 98 Stat. 2031). On December 7, 1987, as part of the Sentencing Act of 1987, Congress specified that the sentencing guideline provisions "shall apply only to offenses committed after the taking effect of" the Sentencing Reform Act of 1984. Pub. L. No. 100-182, § 2(a), 101 Stat. 1266. In light of that specific statute, petitioners were not entitled to have their sentences evaluated under sentencing guidelines that took effect after their crimes were committed.[7]

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[7] See *Gallardo* v. *Quinlan*, 874 F.2d 186, 188 (3d Cir. 1989); *United States* v. *Watson*, 868 F.2d 157, 158 (5th Cir. 1989); *United States* v. *Stewart*, 865 F.2d 115, 117-118 (7th Cir. 1988); *United States* v. *Argitakos*, 862 F.2d 423, 424-425 (2d Cir. 1988); *United States* v. *Burgess*, 858 F.2d 1512, 1513-1514 (11th Cir. 1988); *United States* v. *Rewald*, 835 F.2d 215, 216 (9th Cir. 1987). In *United States* v. *Stewart*, *supra*, the Seventh Circuit also pointed out that both the Senate Report accompanying the Sentencing Reform Act of 1984 and the general savings provision of 1 U.S.C. 109 further support the conclusion that the new sentencing statute does not apply to conduct committed before its effective date. 865 F.2d at 116, 118.

Petitioners assert (89-171 Pet. 17; 89-5641 Pet. 10), without elaboration, that failure to apply the sentencing guidelines in their cases would violate due process and the ex post facto prohibition. To the extent that petitioners are suggesting that, between November 1, 1987, the effective date of the sentencing guidelines, and December 7, 1987, the effective date of the Sentencing Act of 1987, they had a right to be sentenced under the new sentencing guidelines, and that their constitutional claims must be judged accordingly, they misread the statute that was in effect before the December 7 clarification. See *United States* v. *Stewart*, *supra*.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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